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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. **705**

C. D. SHEPHERD, ET AL.,

Petitioners,

vs.

OBIE FAUSTER HUNTER, ET AL.,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF
PETITION.**

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April 5, 1949.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

*To the Honorable Fred A. Vinson, Chief Justice of the
United States, and the Associate Justices of the Supreme
Court of the United States:*

Petitioners, C. D. Shepherd, J. W. McDonald, E. F. Allen, M. L. Pennebaker, C. E. Martz, J. J. Kain and F. W. Coyle, who are of the craft of employees known as brakemen, herewith petition for review on writ of certiorari of a decision of the United States Court of Appeals for the Seventh Circuit made December 14, 1948, which became final on denial of rehearing January 14, 1949, affirming an order of the United States District Court for the Northern District of Illinois, Eastern Division.

STATEMENT OF THE MATTER INVOLVED.

Introduction.

This case presents the question whether the injunctive process was properly used in a dispute involving porters and brakemen as to which of these two separate classes of railroad employees shall perform braking duties at the head end of passenger trains of the Atchison, Topeka and Santa Fe Railway Company. The porters, who are employees at will and have no collective bargaining contract, base their claim to the disputed work on custom and usage (R. 16). The brakemen, for whom the Brotherhood of Railroad Trainmen is sole collective bargaining representative under the Railway Labor Act, base their claim on a contract made by their union with the Santa Fe specifically covering the disputed work (R. 210-216). Brakemen had begun to receive assignments to the disputed work pursuant to that contract when this suit by the porters intervened (R. 77). Since October 31, 1944 injunctive orders have secured the porters in the disputed work then held by them (R. 86-89, 141-143, 207-208).

History of the Dispute.

Porters have for many years been assigned, over the Brotherhood's protests, to braking work at the head end of Santa Fe passenger trains in addition to their duties of assisting passengers and keeping cars clean (R. 202-203). The Brotherhood's position has been that the brakemen's basic working agreement with the Santa Fe covered head end braking work (R. 225-229).

On April 20, 1942 the Brotherhood won an Award in the National Railroad Adjustment Board, First Division, for

wages lost by brakemen on account of the Santa Fe's refusal to assign them to this work (R. 58-59). The Board based its money award on its finding that "use of porters or other employees, who do not hold seniority as brakemen, is in violation of claimants' seniority rights" (R. 59). The Board's Award stated that it did not pass on any future claims and it was silent as to whether brakemen should be assigned to the disputed work in the future (R. 59). The porters were not parties to the proceeding in the Board (R. 219).

The Santa Fe refused to pay the wage claims which were allowed by the Award and, instead, sought rehearings before the Board for about two years (R. 132-134). The porters learned of the proceeding at least as early as May, 1942 (R. 109-110), and followed the Santa Fe's efforts for rehearings (R. 216-218, 259-261), but did not seek to intervene in the proceeding because they did not believe the Board had authority to hear them (R. 110, 200-A).

Collective Bargaining Agreement of April 27, 1944.

On April 27, 1944 the Brotherhood and the Santa Fe after many months of collective bargaining (R. 151), entered into a written agreement by which numerous disputes were settled (R. 153). A portion of this agreement provided that brakemen were to be assigned to head end braking duties on a gradual basis over a period of time depending on the manpower situation (R. 210). The brakemen agreed not to make claims for wages lost on account of non-assignment of brakemen during this period (R. 211). The agreement also provided a specific method for payment of claims for past wages, including those which had been allowed by the Board's Award and Order of April 20, 1942.

On May 3, 1944 the Santa Fe notified the Board that

its request for rehearing was withdrawn, the subject matter of the Award "having been disposed of by mutual agreement between the Carrier and the affected organizations" (R. 134).

The existence of this collective bargaining agreement of April 27, 1944 was not noted by the District Court in its findings and conclusions (R. 201-207), or by the Court of Appeals in its opinion (R. 299-307).

The Injunction Suit.

In accordance with the collective bargaining agreement of April 27, 1944 the Santa Fe was in August 1944 proceeding to make assignments of brakemen to head end braking duties. On August 21, 1944 Santa Fe porters as a class brought this suit for a permanent injunction against the railroad and certain individual brakemen, including the present petitioners, who were alleged to be representatives of Santa Fe brakemen as a class (R. 2-5), to prohibit the displacement of porters by brakemen in the performance of the disputed head end braking work (R. 44-45). The National Railroad Adjustment Board, First Division, was named as a defendant (R. 4), but the Brotherhood was not made a party.

The porters base their claim for an injunction on the theory that custom and usage have given them a contract right to do head end braking work, that they were not given notice of the Adjustment Board proceeding in the dispute between the Brotherhood and the Santa Fe, and that the Award which resulted in favor of the Brotherhood was therefore void (R. 39-43). Plaintiffs assert that their present displacement by brakemen in the performance of braking duties is by virtue of the enforcement of the Board's Award (R. 43). They also claim that the agreement between the Santa Fe and the Brotherhood of April

27, 1944 was procured through compulsion and threats of reprisals by the Brotherhood (R. 24-25).

One of the defendants is a vice-president of the Brotherhood, but he is sued as an individual (R. 4). The named brakemen defendants are all employed on the Illinois Division of the Santa Fe, and have no employment rights outside their own seniority district (R. 167, 177). These individual defendants answered, denying that they are representatives of brakemen in the many districts against whom relief is sought, and stating that the Brotherhood is the only proper representative and should be a party (R. 92). The brakemen also contended that plaintiffs, being a separate class of employees and strangers to the contract between the Brotherhood and the Santa Fe which was submitted to the Board as the basis of the brakemen's claims for lost wages, were not entitled to formal notice of the Adjustment Board proceedings, but that they had actual notice thereof and made no attempt to intervene (R. 96-97). The brakemen contended that the Award merely allowed wages claimed by brakemen against the Santa Fe, and had no legal effect on the employment rights of porters (R. 119). The brakemen denied that the agreement of April 27, 1944 between the Brotherhood and the Santa Fe, which did result in assignment of some of the disputed work to brakemen, was made through any compulsion or threats by the Brotherhood (R. 94, 98). The brakemen contended that the Court should not intervene in this jurisdictional dispute between two classes of railroad employees which should be determined only under the processes prescribed by the Railway Labor Act, and they challenged the Court's power to grant injunctive relief because they urged the involvement of a labor dispute within the meaning of the Norris-LaGuardia Act (R. 117-121).

The Santa Fe's answer denied that the Adjustment Board Award was invalid, and asserted that the April 27,

1944 agreement to assign brakemen to the disputed work was voluntarily entered into on its part (R. 76, 78-79). The Santa Fe prayed that the plaintiffs' suit be dismissed (R. 80).

Hearing On the Preliminary Injunction.

The undisputed evidence regarding the making of the April 27, 1944 contract disproved plaintiffs' allegation that there was any compulsion connected with it (R. 167-168). As to actual knowledge on the part of the porters of the Adjustment Board proceeding prior to the entry of the Award, evidence was excluded as immaterial (R. 261-263).

The Preliminary Injunction.

The District Court granted a preliminary injunction on the ground that the Adjustment Board Award deprived plaintiffs of their property without due process and was void (R. 206). The preliminary injunction, which continued restraints previously imposed by temporary restraining orders, prohibited "any steps to enforce the said Award by removing and displacing" any plaintiffs from their positions (R. 207-208). The effect of these injunctive orders was to prevent performance of the April 27, 1944 agreement (R. 163), although there were no findings or conclusions stated concerning this contract (R. 201-207).

Bond for the preliminary injunction was fixed at \$1,000, an amount which was admittedly only a small fraction of the brakemen's lost wages (R. 145). The reason assigned for the nominal amount was that the District Judge saw no merit in the brakemen's defense (R. 200-B).

The Decision On Appeal.

The brakemen appealed from the injunction order to the Court of Appeals for the Seventh Circuit, in which Court their erstwhile co-defendant, the Santa Fe, joined the opposition and urged affirmance of the injunction, thus reversing the position the railroad had taken in its answer (R. 80, 326).

The Court of Appeals affirmed (R. 308). It held that the Brotherhood was not an indispensable party because the order appealed from took nothing from the brakemen to which they were "rightfully entitled" (R. 306). The Court held that the only issue "is whether the Order of the Board is void for failure to give plaintiffs notice of the proceeding," and concluded that the porters were entitled to such notice (R. 302, 304). The opinion indicates that actual knowledge of the Board proceedings on the part of the porters might have been the equivalent of formal notice, but the Court pointed out that "the record does not disclose that the porters had notice of any kind prior to the entry of the Award" (R. 303). The opinion did not express any view as to the exclusion by the trial court of evidence on the subject of prior knowledge.

The Court's opinion recognized that the dispute involved in this case is analogous to that in *Missouri-Kansas-Texas R. Co. et al. v. Randolph, et al.* (8th Cir. 1947), 164 F. 2d 4 (R. 304). In that case the carrier, pursuant to an agreement with its brakemen, proposed to cancel its contract with the porters and assign the disputed work to brakemen (R. 302). Injunctive relief was denied because of the existence of the jurisdictional dispute determinable only under the Railway Labor Act, and because of the existence of a labor dispute within the meaning of the Norris-LaGuardia Act. The Court of Appeals for the Seventh Circuit considered the instant case distinguishable from

the *Randolph* case on the theory that in our case "it is an attack only upon an Award which has been made," and that here the injunction sought does not prevent settlement of the dispute by collective bargaining (R. 302, 304). However, during the argument of the appeal it was conceded that performance of the April 27, 1944 contract between the Brotherhood and the Santa Fe, which purported to settle the dispute, was prohibited by the injunction (R. 312-313).

The Court of Appeals also expressed the view that the Adjustment Board exceeded its authority in construing the basic working agreement between the Brotherhood and the Santa Fe as applicable to head end braking work (R. 305-306). But the Court's decision that the Award is void was based primarily on lack of notice to porters, and the opinion so states (R. 306).

Application for Rehearing.

The brakemen applied for a rehearing, chiefly on the ground that a consideration of the April 27, 1944 bargaining agreement, which the Court had failed to mention in its opinion, would require a different result in view of the Court's holding that the parties were "free to attempt to settle the dispute by collective bargaining" (R. 312-313). Rehearing was denied, without opinion (R. 345).

EMENT AS TO JURISDICTION.

ight To Be Reviewed.

er 14, 1948, the United States Court of Appeals for the Seventh Circuit entered judgment affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, granting a preliminary injunction (R. 308). The said judgment of the United States Court of Appeals became final upon denial of a petition for rehearing on January 14, 1949 (R. 345). Application for writ of certiorari is denied (R. 349). The opinion of the Court of Appeals, dated January 14, 1948, has been made part of the printed opinion (R. 299-307). It is reported in 171 F. 2d 594. The Court rendered no opinion, but the preliminary injunction itself (R. 201-208) is reported at 78 F.

Provisions and Cases Sustaining Jurisdiction.

The Court of the United States has jurisdiction, upon writ of certiorari granted upon the petition of any party, to review a judgment rendered in a United States District Court. 28 U. S. C. Sec. 1254. The application must be filed within 90 days after entry of such judgment. 28 U. S. C. Sec. 2101.

The jurisdiction to grant certiorari extends to the review of a preliminary injunction. *Land v. United States*, 335 U. S. 731, 735; *United States v. General Motors Corp.*, 323 U. S. 373, 377; *Toledo Scale Co. v. Computing Scale Co.*, 339 U. S. 399, 418. Where petition for rehearing is denied, the judgment does not become final for

purposes of review until disposition of such petition.
Citizens' Bank of Michigan City v. Opperman, 249 U. S.
 448, 450.

Substantial Questions Involved.

Substantial questions are involved on this appeal, as will appear from the statement of them which immediately follows.

QUESTIONS PRESENTED.

The questions presented herein include the following:

1. Whether a union acting as collective bargaining representative of railroad employees is an indispensable party defendant to a suit brought by a rival labor group which seeks:

(a) To enjoin performance of a labor contract made by the union with the railroad on the ground that the union forced the railroad to enter into the contract through threats and compulsion.

(b) To nullify a National Railroad Adjustment Board Award rendered in favor of the union in a dispute between the union and the railroad on the ground that the rival labor group did not receive proper notice of the proceeding.

2. Whether a dispute which involves the conflicting demands of two groups of railroad employees who claim the same work is a jurisdictional dispute determinable only by negotiation, mediation or arbitration as provided by the Railway Labor Act or whether such a dispute presents a justiciable controversy by reason of circumstances as follows:

(a) One of the competing groups has submitted a dispute between it and the railroad over wage claims relating to the disputed work to the National Railroad Adjustment Board and has obtained an award allowing such claims, of which proceeding the other group received no formal notice.

(b) The group which won the Adjustment Board Award subsequently obtained a contract with the railroad specifically promising the disputed work to employees in that group.

(c) The plaintiff group of employees has not attempted to settle its claims under the processes prescribed by the Railway Labor Act.

3. Whether a dispute such as that described in the preceding paragraph is a labor dispute, and if so whether the restraints imposed by the Norris-LaGuardia Act on the granting of injunctive relief are applicable to a case which involves or grows out of such a dispute.

4. Whether in a National Railroad Adjustment Board proceeding involving interpretation and application of a collective bargaining agreement between a railroad and a labor union, as applied to wage claims of employees represented by the union, other employees who are then performing the work to which the wage claims relate, but who claim no rights under the contract before the Board and admit that they had no right to intervene in the Board's proceeding, are nevertheless entitled to notice of the proceeding, and if so, whether actual knowledge thereof is sufficient.

5. Whether an action based on alleged irregularities as to notice in a National Railroad Adjustment Board proceeding may be maintained by third parties after the subject matter of the dispute before the Board has been settled by mutual agreement of the parties to the Board proceeding, and after more than two years have elapsed since the Adjustment Board Award by its terms became effective.

6. Whether in a suit brought by a group of railroad employees seeking an injunction to secure for themselves certain work which is shown to have been promised by a collective bargaining agreement to another employee group, the Court may properly grant a preliminary injunction without making any finding of fact or stating any conclusion of law with respect to the labor agreement, the

performance of which is being prohibited by the preliminary injunction.

7. Whether a Court which issues a preliminary injunction may properly fix the injunction bond in an amount admittedly less than enough to cover losses to be sustained by those enjoined merely because the Court believes that the defenses raised are not meritorious.

REASONS FOR ALLOWANCE OF WRIT.

There are special and important reasons for review on writ of certiorari herein, as follows:

1. The Court of Appeals has held that performance of a railroad labor union's collectively bargained contract with a railroad may be enjoined and that a National Railroad Adjustment Board award rendered in favor of the labor union may be nullified in a suit maintained in the absence of the union as a party defendant. This holding decides a federal question in a way probably in conflict with applicable decisions of this Court, and, if not reviewed, may establish a precedent which will seriously imperil the position of the railroad labor union as a collective bargaining entity, contrary to the public policy declared in the Railway Labor Act.

2. The Court of Appeals has held that a group of railroad employees who are claiming the same work as that covered by a collectively bargained contract between the railroad and a competing group of employees may maintain a suit for an injunction to secure the disputed work for themselves without first attempting to settle their dispute through the processes prescribed by the Railway Labor Act and without compliance with the Norris-LaGuardia Act. This holding is in conflict with the decision on the same matter by the Court of Appeals for the Eighth Circuit in *Missouri-Kansas-Texas R. Co. v. Randolph*, 164 F. 2d 4, certiorari denied in 334 U. S. 818. Certiorari should be granted to settle this conflict between the Seventh and Eighth Circuits.

3. The Court of Appeals has held that in a National

Railroad Adjustment Board proceeding involving interpretation and application of a collective bargaining agreement between a railroad and a labor union as applied to wage claims of employees represented by the union, other employees who are then performing the work to which the wage claims relate but who claim no rights under the contract before the Board and admit that they have no right to intervene before the Board are nevertheless entitled to notice of the proceeding, and that actual knowledge does not satisfy the requirement of notice. This holding decides a federal question in a way probably in conflict with the applicable decision of this Court, and should be reviewed because of its important bearing on the conduct of all Adjustment Board proceedings involving disputes between a carrier and a union as to the scope of their working agreements. The holding now sought to be reviewed casts serious doubt on the established rule that the Railway Labor Act authorizes the Adjustment Board to decide disputes only between employer and employee, and not disputes between groups of employees.

4. The Court of Appeals has held that an action based on alleged irregularities as to notice in a National Railroad Adjustment Board proceeding may be maintained by third parties after the subject matter of the dispute before the Board has been settled by mutual agreement of the parties to the Board proceeding, and after more than two years have elapsed since the Adjustment Board award under attack became effective by its terms, and that the Board's award may be reviewed on its merits and that injunctive relief may be granted to prevent compliance. This holding decides a federal question in probable conflict with the applicable decisions of this Court, with Section 3 First (p) and (q) of the Railway Labor Act and in that it purports to provide a new method for judicial review of an Adjustment Board proceeding and

thus provides an extension of the methods provided under the Railway Labor Act which have heretofore been regarded as exclusive.

5. The Court of Appeals has sanctioned the action of the District Court in granting a preliminary injunction to enjoin the performance of a labor contract without making findings of fact or stating conclusions of law with respect to the contract enjoined. Such action is in conflict with the applicable decisions of this Court construing Rule 52(a) of the Rules of Civil Procedure. The decision of the Court of Appeals holds in effect that compliance with this rule is a matter which lies within the District Court's discretion. This question is of highest importance to a proper review of injunctive orders.

6. The Court of Appeals has sanctioned the action of the District Court in issuing the preliminary injunction on the giving of a bond in an amount admittedly only a small fraction of the losses to be sustained by those enjoined, merely because the Court believes the defenses raised are not meritorious. This holding decides a federal question in a manner probably in conflict with Rule 65(c) of the Rules of Civil Procedure, which should be construed as requiring a federal court which issues an injunction to admit the possibility of its own error. This holding is of extreme importance in all cases wherein injunctive relief is granted against large groups of employees and involves losses in wages for which their remedy may be forfeited due to the Court's refusal to require more than a nominal bond to protect them.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings

of the said Court of Appeals had in the case numbered and entitled on its docket No. 9595, *Obie Fauster Hunter, et al., Plaintiffs-Appellees, v. The Atchison, Topeka and Santa Fe Railway Company, Defendant-Appellee, and C. D. Shepherd, et al., Defendants-Appellants*, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Court of Appeals be reversed by this Court; and for such further relief as to this Court may seem proper.

April 5, 1949.

C. D. SHEPHERD, J. W. McDONALD,
E. F. ALLEN, M. L. PENNEBAKER,
C. E. MARTZ, J. J. KAIN and F. W. COYLE,
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Respondents.

**BRIEF IN SUPPORT OF PETITION FOR
 WRIT OF CERTIORARI.**

**Opinions of the Courts Below, Jurisdiction, and
 Statement of the Case.**

The preceding petition at page 9, contains reference to the opinions of the courts below and at pages 9-10, a statement as to the jurisdiction of this Court. At pages 2-8 of said petition there appears a statement of the case. These portions of the petition are adopted herein and made part of this brief.

SPECIFICATION OF ERRORS.

If the petition is granted, the petitioner will urge that the Court of Appeals for the Seventh Circuit erred in the following respects:

1. In holding that the Brotherhood of Railroad Trainmen is not an indispensable party to this suit, notwithstanding the fact that the Brotherhood was the party in whose favor the National Railroad Adjustment Board Award was rendered and which this suit seeks to nullify, and notwithstanding the fact that the Brotherhood is a party to the collective bargaining agreement the performance of which this suit seeks to enjoin.

2. In holding that the plaintiff class of railroad employees may maintain this action to secure for themselves the same work as that covered by a collectively bargained contract between the railroad and a competing class of employees without first attempting to settle their dispute through the processes prescribed by the Railway Labor Act, and without compliance with the Norris-LaGuardia Act.

3. In holding that plaintiffs, although they were strangers to the contract between the Brotherhood and the Santa Fe being interpreted by the Adjustment Board as applied to wage claims of brakemen, were entitled to notice of and to be heard in said proceeding and that actual knowledge thereof on the part of the plaintiffs did not satisfy the requirement of notice.

4. In holding that an award of the National Railroad Adjustment Board may be reviewed and set aside in a suit brought by third parties after the subject matter of the dispute before the Board has been settled by mutual agreement of the parties to the Board proceeding, and after more than two years have elapsed since the Adjustment Board Award by its terms became effective.

5. In refusing to hold that the District Court, when granting the preliminary injunction, should have made findings of fact and stated conclusions of law with reference to the collective bargaining agreement the performance of which was being enjoined.

6. In refusing to hold that the District Court, in granting the preliminary injunction, erred in requiring plaintiffs to furnish only a nominal bond to protect the persons enjoined and in denying them adequate coverage solely on the ground that their defense did not seem meritorious.

SUMMARY OF ARGUMENT.

I. The Brotherhood as an Indispensable Party.

The Brotherhood of Railroad Trainmen is an indispensable party to this suit because it was the party in whose favor the Adjustment Board Award under attack herein was rendered and the party who made with the railroad the collective bargaining agreement of April 27, 1944 sought to be enjoined herein. The Court of Appeals has held that the Award in the Brotherhood's favor was void, wherefore the Court concluded that there was no need to make the Brotherhood a party. This holding confuses the right of a party to be heard in an action with his right to prevail therein, and is of special importance because of its relation to railroad labor dispute settlement procedures authorized under the Railway Labor Act.

II. Applicability of Railway Labor Act and Norris-LaGuardia Act.

The Court of Appeals for the Eighth Circuit has held, in a jurisdictional railway labor dispute substantially similar on its facts to the one here involved, that plaintiffs had no right to an injunction without first attempting to settle their dispute under the processes prescribed by the Railway Labor Act and without compliance with the Norris-LaGuardia Act. The decision of the Court of Appeals for the Seventh Circuit now sought to be reviewed holds that court intervention by injunction in such a dispute is proper notwithstanding both these statutes. This conflict between the Seventh and Eighth Circuits justifies issuance of the writ.

III. Knowledge and Notice of the Adjustment Board Proceeding.

Plaintiffs, having had actual knowledge of the Adjustment Board proceeding under attack, and having made no attempt to intervene, should not be heard to complain that they did not receive formal notice. Moreover, the Railway Labor Act did not require notice to be given to porters because the Board merely had before it wage claims in which plaintiffs had no legal interest and plaintiffs have themselves conceded that the Board had no authority under the Act to hear a dispute between them and the brakemen in that proceeding. The Court of Appeals' holding that the Board's Award is void for failure to give the porters notice and hearing in such a proceeding should be reviewed.

IV. The Circuit Court's Review of the Adjustment Board Award on Its Merits.

The Court of Appeals has undertaken in its opinion to review, on the merits, the Adjustment Board's interpretation of the contract between the Brotherhood and the Santa Fe as applied to the wage claims passed on by the Board. There is no occasion for such a review because that dispute was settled by mutual agreement while the Santa Fe was still contesting the matter before the Adjustment Board. Further, the Railway Labor Act does not authorize court review of an Adjustment Board Award in a suit such as this, brought by third parties more than two years after the Award by its terms became effective. The Circuit Court's holding has the effect of extending the scope of judicial review of Adjustment Board awards beyond the provisions of the Railway Labor Act.

V. Absence of Findings or Conclusions Regarding April 27, 1944 Contract.

Inasmuch as the April 27, 1944 bargaining agreement between the Brotherhood and the Santa Fe covers the disputed work, and as its performance is prohibited by the preliminary injunction, it is clear that this contract should have been the subject of findings of fact and conclusions of law in compliance with Rule 52(a) of the Rules of Civil Procedure. The failure of the District Court to make any findings or state any conclusions with reference to this all-important contract and the failure of the Court of Appeals to mention the subject in its opinion indicate that Rule 52(a) has been treated as a purely discretionary directive. The resulting confusion regarding the status of this contract emphasizes the necessity for enforcing compliance with Rule 52(a).

VI. Deliberate Inadequacy of the Injunction Bond.

The trial judge fixed the preliminary injunction bond in an amount admittedly representing only a small fraction of the wage losses to be sustained by the enjoined employees for the stated reason that he did not think their defenses were good. Such action by the trial court, which received the tacit approval of the Court of Appeals, rejects the basic principle underlying the statutory requirement for bond that a court which grants a preliminary injunction must assume the possibility of its own error and provide adequate security against this contingency without regard to its apparent remoteness.

ARGUMENT.

I.

This Court Should Decide Whether a Railroad Labor Union's Collectively Bargained Contract May Be Enjoined and an Adjustment Board Award in Favor of the Union May Be Nullified in a Suit Which Does Not Name the Union as a Party Defendant.

This suit complains primarily against a labor contract and an Adjustment Board Award, and yet it does not name as a defendant the party in whose favor the contract was made and in whose favor the Award was rendered. The Brotherhood was a contracting party with the railroad to the April 27, 1944 agreement, performance of which is sought to be enjoined (R. 210-216), and it was the party which won the Award sought to be set aside (R. 58-59). In addition, the Brotherhood stands charged with having forced the Santa Fe to make the contract in question "under threats of reprisals" (R. 25). The injunction, as issued, runs against the Brotherhood as representative of Santa Fe brakemen (R. 203, 207).

The question for decision below was whether the Brotherhood is an indispensable party in view of these obvious elements of the Brotherhood's material interest in the subject matter of this suit and the adverse effect of this action on those interests.

The absence of the Brotherhood as a party was not explained on the ground that it is merely the agent for the employees it represents. The individual brakemen named as the supposed representatives of the class of brakemen have employment rights only in one of the many Santa Fe

seniority districts (R. 166, 167), and their supposed representative capacity flows from the District Court's factual findings that they are Brotherhood members (R. 202) and that the Brotherhood represents Santa Fe brakemen as a class (R. 203). The Court of Appeals expressed its view that the Brotherhood is not an indispensable party simply as a corollary to its principal holding that the Adjustment Board Award is void. Its reasoning was as follows (R. 306-307):

"There is also the contention that the Brotherhood of Railroad Trainmen as representative of the brakemen was an indispensable party to the instant action. Again, this argument proceeds on the theory that the order appealed from takes something away from the brakemen to which they are *rightfully* entitled. As already shown, such is not the case." (Italics ours.)

We submit that the above holding applies an entirely new test of indispensability, which is in effect that no absent person is to be considered an indispensable party unless it is shown that he would, if present, prevail in the action. Such a rule presupposes that the Court may decide, *ex parte*, whether a contract or an award under attack is valid, and that if it decides against validity, it may dispense with the naming of any persons as parties who may claim under the voided instruments.

To say the least, this holding constitutes a distinct challenge to the basic doctrine stated by this Court in *Mallow v. Hinde*, 25 U. S. 116 at 119-120:

"* * * no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court."

The special importance of this issue lies not so much in the Court's departure from the established principles governing indispensable parties as in the fact that the Court of Appeals' decision has the effect of denying the

efficacy of railroad labor union conduct in submitting disputes for adjustment under the Railway Labor Act, and in bargaining collectively to settle them. The Circuit Court has held that the union may suffer invalidation of its award or an injunction against its contract in a court proceeding to which it is not even made a party. We submit that such a holding fully warrants review by this Court.

II.

This Court Should Resolve the Conflict Between the Seventh and Eighth Circuits on the Question Whether a Jurisdictional Dispute Between Groups of Railroad Employees Constitutes a Justiciable Controversy, and Whether the Norris-LaGuardia Act Is Applicable When Injunctive Relief Is Sought in Such a Dispute.

In *Missouri-Kansas-Texas R. Co. v. Randolph*, 164 F. 2d 4 (8th Cir. 1947), certiorari denied in 334 U. S. 818, the Court held that an injunction suit by M-K-T porters against the railroad and its brakemen to prohibit displacement of porters by brakemen in the performance of head end braking work presented a jurisdictional dispute determinable under the Railway Labor Act and involved a labor dispute within the meaning of the Norris-LaGuardia Act, wherefore injunctive relief should not be granted. In that case, the porters were not merely employees at will, but had a written working agreement which the railroad proposed to cancel as applied to the disputed work in order to comply with an agreement made with the brakemen's union. The brakemen's union in that case had previously demanded lost wages from the railroad on being denied the disputed work, but had not filed wage claims with the Adjustment Board as the Brotherhood did in the instant case. Otherwise, the factual situations

presented in the two cases are identical. The Eighth Circuit's view of the applicable law was stated as follows (164 F. 2d 8):

"To declare that a labor union's resort or threat to resort to administrative processes of mediation and adjustment by expert agencies especially set up and established by Congress for settlement of its labor disputes constitutes an enjoined tort would completely defeat the intent of Congress as clearly shown in the Acts. We find no controversy is presented here except the labor dispute, the settlement of which is clearly within the purview of the Acts and may not be accomplished by injunction in the first instance."

In our case the Court of Appeals did not say that the *Randolph* decision was wrong, but it reached an opposite result, based on the following suggested distinction (R. 304):

"The instant case is distinguishable because it is an attack only upon an Award which has been made."

This proposed distinction does not begin to reconcile the decisions. It ignores the fact that in our case the subject matter of the Award, that is, the wage claims, was disposed of by mutual agreement between the Santa Fe and the Brotherhood (R. 134). It ignores the fact that it was the April 27, 1944 agreement, and not the money Award for wages, which promised assignment of the disputed work to brakemen (R. 210-216). It also ignores the fact that the injunction has had no effect whatever on the Award said to have been the only object of attack in this suit, but, instead, has prohibited performance of the April 27, 1944 agreement and has secured the porters in the disputed work (R. 163). Chief Judge Major apparently had these facts well in mind during the hearing of the appeal in this case when he said (R. 312-313):

"Well, isn't enforcement and recognition of that

contract covered in this injunction? Under this injunction you can not go on and carry out this contract, can you?"

Also during the hearing, Judge Major said (R. 314):

"As long as this injunction stands the porters will continue."

These facts obviously destroy any hope of reconciling the decision in the *Randolph* case with this one on the ground that this case "is an attack only upon an Award which has been made". Of course, the conflict in the two decisions would have been more sharply revealed if the Court of Appeals for the Seventh Circuit had seen fit to mention the April 27, 1944 agreement in its opinion.

The need for resolution of the conflict between the *Randolph* decision and this one is the more apparent when we consider that both cases purport to follow the line of decisions of this Court which culminated in *Order of Railway Conductors v. Pitney*, 326 U. S. 561, wherein it was said that Congress, in enacting the Railway Labor Act for settlement of railway labor disputes, "intended to leave a minimum responsibility to the courts" (326 U. S. 566).

The decision sought to be reviewed stands not merely for court intervention in jurisdictional railway labor disputes at the suit of persons who have not submitted their claims to any administrative agency, but also holds in effect that collective bargaining agreements purporting to settle such disputes may be entirely ignored in the process. The importance of these questions is clear, and we submit that the writ ought to be granted.

III.

This Court Should Decide Whether Actual Knowledge Is the Equivalent of Formal Notice of Adjustment Board Proceedings, and Whether There Are Constitutional Objections to the Established Practice of the National Railroad Adjustment Board in Giving Notice of a Proceeding Involving Interpretation of a Labor Contract Only to the Parties to the Contract.

We have already seen that the real objective of this suit is to enjoin performance of that part of the April 27, 1944 agreement which promises to assign the disputed work to brakemen (R. 210-216), rather than to invalidate the Adjustment Board Award of April 20, 1942 allowing wage claims to brakemen (R. 58-59). We think this becomes all the more apparent when we consider the basis for the Court of Appeals' holding that "the only issue below, as well as here, is whether the Order of the Board is void for failure to give plaintiffs notice of the proceeding" (R. 302).

Involved with the question of any legal requirement for notice to porters of the Adjustment Board proceeding is the fact that the porters had actual knowledge of it. The evidence in the record shows actual knowledge only during the later stages of the proceeding when the Santa Fe was attempting to get a rehearing (R. 109-110, 216-218), because evidence offered by the brakemen to show earlier actual knowledge was excluded as immaterial by the trial court (R. 258-263).

This evidence point was not discussed by the Court of Appeals, although that Court rejected the brakemen's argument as to the effect of actual knowledge on the ground that "the record does not disclose that the porters

had notice of any kind prior to the entry of the Award" (R. 303). This apparent oversight was pointed out in the petition for rehearing (R. 311-312), which was denied (R. 345). We are therefore unable to explain how the Court could base its holding on the ground that the evidence did not show any early knowledge on the part of the porters and yet tacitly approve the District Court's ruling that evidence offered to show early knowledge was immaterial. The evidence point alone would clearly require reversal in view of what was said by this Court in *Elgin, Joliet & Eastern R. Co. v. Burley*, 327 U. S. 661, at 666-667:

"* * * we did not rule * * * that an employee can stand by with knowledge or notice of what is going on with reference to his claim * * * before the Board * * * and then come in for the first time to assert his individual rights."

As the decision of the Court of Appeals now stands, it will undoubtedly give encouragement to employees who believe their interests are involved in a pending Adjustment Board proceeding to lie in wait until the matter is settled and then upset the result if it does not please them.

Turning now to the question whether notice to porters of the Adjustment Board proceeding was required, the issue is whether the porters, because they were performing head end braking work as employees at will, were entitled to notice of the fact that the Brotherhood was claiming before the Board that under its contract with the Santa Fe, brakemen should be paid for wages lost on account of being denied the head end work. The Court of Appeals held the Award was void "primarily upon the ground that it was made without notice to the porters, as the statute requires, and that their constitutional right to a hearing was denied" (R. 306).

The above ruling ought to be reviewed because it holds that the Adjustment Board must, in a single proceeding, decide jurisdictional disputes between competing classes of railroad employees. The only purpose of giving notice to the porters would be to permit them to be heard by the Board. Because they were strangers to the contract before the Board, they could have no claims to assert thereunder. Nor could they have any legal interest in the question whether the brakemen's wage claims against the Santa Fe were allowed or disallowed. Therefore, the only conceivable purpose of the porters' participation in the proceeding would be to present their case for continuing in the head end braking work, *i.e.*, to assert their right to continue performing this work *at the will* of the Santa Fe. Since the railroad was in full agreement with this position, the Board, so far as the porters were concerned, would then be hearing a dispute not between employer and employee, but a dispute between two separate classes of employees engaged in a jurisdictional dispute.

The Board has no authority to hear such disputes. Section 3 First (i) of the Railway Labor Act authorizes the Board to hear only "disputes between an employee or group of employees and a carrier or carriers". This question was directly answered in *Order of R. R. Tel. v. New Orleans, Texas & Mex. Ry. Co.*, 156 F. 2d 1 (8th Cir. 1946), certiorari denied in 329 U. S. 758, which involved the Board's denial of an application to intervene made by one labor group during consideration of a contract between the carrier and another labor group. The Court held (156 F. 2d 5):

"The Act authorizes the Board to interpret and to apply the collective bargaining contracts of the crafts in controversies between the crafts and the carriers involving the contracts; but it is given no authority

to pass on disputes between the crafts. The Act leaves the settlement of inter-craft disputes to conference or to the Mediation or Emergency Boards."

Applying this decision to our case, it is apparent that if the Adjustment Board which heard the brakemen's wage claims had no power to hear the porters in that proceeding, then there was no duty to give the porters notice of it. The porters acknowledged, at least inferentially, that they had no right to notice when they urged that their failure to apply for intervention in the Board proceeding was due to the fact that their intervention would have made it a dispute between classes of employees and that under the rule of the above quoted case the Board would have no power to hear them in that proceeding (R. 200-A).

The rule that the Board cannot hear jurisdictional disputes between separate classes of employees does not conflict with the Seventh Circuit's decision in *Nord v. Griffin*, 86 F. 2d 481 (1936), certiorari denied in 300 U. S. 673, where an individual employee was held entitled to notice and hearing in a proceeding involving interpretation of his own working agreement as applied to his individual seniority status. That case did not involve an inter-craft dispute, and the Court of Appeals has radically extended the rule therein announced by its holding that the rule is applicable to the inter-craft dispute involved here (R. 302-304). In this ruling the Court of Appeals has also failed to recognize the manifest inconsistency in the porters' position of urging, on the one hand, that the rule of *Nord v. Griffin* should be extended to require the Board to hear an inter-craft dispute, and on the other, urging that they should be excused from attempting to intervene because the Board had no power to hear such a dispute.

We think it is clear that Section 3 First (j) of the Railway Labor Act, in requiring the Board to give notice

of a proceeding to the employees and the carrier "involved" in a dispute submitted to the Board must be construed not to include employee groups whose claims the Board has no authority to hear in that proceeding.

Of course, this is not to say that employees in the rival group have no remedy. If they have a claim to certain work based on a working agreement which they believe has been or will be affected by an Adjustment Board proceeding, they may bring their own proceeding before the Board for interpretation of their own contract as applied to this work. Railway Labor Act, Section 3 First (i). If they have no such contract, they may seek one in conference with the employer, and enlist the aid of the Mediation Board if needed. Railway Labor Act, Section 2 First and Second; Section 5. If the work they are then doing is as "embodied in agreements", the Railway Labor Act gives them the assurance of at least thirty days' notice of any proposed change, together with an additional period if the Mediation Board intervenes (Section 2, Seventh; Section 6).

It is obvious from the above that the real gravamen of the porters' suit is not that the Railway Labor Act has been violated, but that the Act contains no guarantees of automatic job security to employees who have not chosen to avail themselves of the abovementioned provisions. No one doubts that an employee who accepts employment under condition that his job and all the duties thereof are terminable at his employer's will has reason to fear that his employer may contract all or part of that job away to another. Such risks plainly inhere in any employment terminable "at will". We submit that neither the Constitution nor the Railway Labor Act was intended to remove such risks, and that a federal court should not undertake to do so by injunction.

IV.

This Court Should Decide Whether Review of an Adjustment Board Order May Be Had After It Has Been Settled by Agreement, at the Suit of Third Persons Brought More Than Two Years After the Order Became Effective.

A secondary basis for the Court of Appeals' holding that the Adjustment Board Award was void is on the theory that the Brotherhood's basic working agreement of 1926 was so badly misinterpreted by the Board that it amounted to a rewriting of the agreement, and in so doing the Board exceeded its authority (R. 305-306). The Court said that while some provisions of the agreement "may furnish a feeble basis for the contention that the brakemen under this contract were entitled to the disputed work," there was no room for doubt that the contract did not cover the head end braking duties (R. 306).

Of course this holding by the Court of Appeals merely substitutes its own interpretation for that of the Board, and is therefore a review of the Board's Award on its merits. Before considering certain jurisdictional objections to this action, two factual elements not mentioned in the Court's opinion should be noted:

First, the Court had only a few excerpts from the 1926 contract before it (R. 241-242) and none of the provisions which had been relied on by the Brotherhood in the Board proceeding (R. 226).

Second, the subject matter of the Board's Award was, among other things, settled by the April 27, 1944 agreement before the Santa Fe withdrew its petition for rehearing (R. 134), wherefore the soundness of the Board's interpretation became a moot question.

It is therefore clear, first, that judicial interpretation of a contract which the court has not read demands powers

of perception no court can possess, and second, that any review of the Board's action in interpreting the 1926 agreement which ignores the fact that the matter was settled by the parties can have little more than academic value.

But if we should assume that there was occasion to review the Board's Award on its merits, the question is whether the Court had authority to review it. Section 3 First (p) of the Railway Labor Act authorizes judicial review of an Adjustment Board order only at the suit of the petitioner or a person in whose favor the order was made, and Section 3 First (q) places a two-year limitation on such suits. This suit was brought by persons other than those in whose favor the order was made and more than two years after the Board's order became effective according to its terms (R. 1, 58).

It follows that the review of the Adjustment Board Award and Order undertaken by the Court of Appeals in this case has the effect of enlarging the jurisdiction of a federal court beyond the limits expressed in the applicable provisions of the Railway Labor Act. We submit that such action should be reviewed.

V.

This Court Should Decide Whether Rule 52(a) of the Rules of Civil Procedure Provides a Mandatory Requirement That a District Court Which Enjoins Performance of a Collectively Bargained Labor Contract Shall Make Findings of Fact and Conclusions of Law With Reference to the Contract Under Attack.

We have pointed out that the April 27, 1944 bargaining agreement between the Santa Fe and the Brotherhood, which specifically promised the disputed work to brakemen, was treated with complete silence in the Court of Appeals' opinion, it having received the same treatment

from the District Court in its findings and conclusions (R. 201-207). The District Court also omitted any findings or conclusions on issues such as the existence of a labor dispute and the porters' actual knowledge of the Board proceedings. The brakemen specified all such omissions as errors to the Court of Appeals (R. 253-256), but that Court refused to discuss the applicability of Rule 52(a) of the Rules of Civil Procedure (R. 317, 345).

The Court of Appeals' silence is especially significant because some of the issues passed over by the District Court were passed on by the Court of Appeals, and presumably they were considered by it to be material. An example is the issue of the porters' actual knowledge of the Board proceedings (R. 303). The inference is strong that the Court of Appeals considered that Rule 52(a) of the Rules of Civil Procedure provides a discretionary directive, rather than a mandatory requirement, that a District Court which issues a preliminary injunction shall "set forth the findings of fact and conclusions of law which constitute the grounds of its action."

We are satisfied for purposes of this question to rely solely on the failure of the District Court to make any finding or state any conclusion as to the April 27, 1944 bargaining agreement, which the porters put in evidence as part of their case (Plaintiffs' Exhibit 2, R. 153-154, 210-216). This agreement, which is obviously the heart of this whole controversy, would have resulted in assignment of brakemen to the disputed work had not the injunctive orders forbidden it (R. 163, 312-314).

It has been held that one of the chief objects of Rule 52(a) is to facilitate consideration of all material issues by a reviewing court. As this Court said in *Mayo v. Lake-land Highlands Can. Co.*, 309 U. S. 310, at 316:

"It is of the highest importance to a proper re-

view of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52(a) of the Rules of Civil Procedure."

The evil which may flow from non-compliance is vividly illustrated here. The District Court has omitted any finding or conclusion concerning the most important of all issues in the case, and the Court of Appeals, instead of deciding this issue or remanding the case to the District Court for decision, has merely followed the District Court's lead by ignoring all questions raised by the April 27, 1944 agreement.

In so doing, the reviewing court has gone further. It has sown the seeds of inevitable confusion by coupling its silence as to the April 27, 1944 bargaining agreement with the statement in its opinion that the parties are "free to attempt to settle the dispute by collective bargaining" (R. 302). To the brakemen this makes the opinion self-contradictory because the above language indicates that the Brotherhood's right to make the April 27, 1944 bargaining agreement has been acknowledged (R. 312). To the Santa Fe it means the opposite (R. 329-330). To the porters, who, after introducing this contract in evidence, then saw disproved their charge that the Brotherhood forced it on the Santa Fe by threat of reprisals (R. 25, 167-168), the Court of Appeals quite properly omitted any reference to this "so-called" contract (R. 339-340).

We submit that unless Rule 52(a) was intended by this Court to contain only casual advice to a District Court which issues a preliminary injunction to make findings and state conclusions, this clearly is a matter calling for exercise of this Court's power of supervision.

VI.

This Court Should Decide Whether an Injunction Bond May Be Purposely Fixed in an Amount Representing Only a Small Fraction of the Defendants' Losses Merely Because the Judge Does Not Believe He Could Possibly Be Wrong in Issuing the Injunction.

The District Court fixed the injunction bond at \$1,000 (R. 208). The undisputed evidence showed that losses of brakemen in wages alone, due to the injunction, accumulated at the rate of \$900 per day (R. 145). Lost wages of brakemen may thereby be now estimated in excess of \$350,000. This startling disparity might seem only an abuse of the trial court's discretionary power to fix the amount of the security, except that the trial judge volunteered his reason for requiring only a nominal amount: *he thought there was no merit in the defense* (R. 200-B). The brakemen assigned this as error (R. 256), but the Court of Appeals did not discuss the point in its opinion (R. 299-307).

For purposes of this question it does not matter whether the injunction bond should have been required of plaintiffs in compliance with Rule 65(c) of the Rules of Civil Procedure, requiring security for "the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained," or under Section 7(e) of the Norris-LaGuardia Act, requiring security against costs, damages and attorney's fees "caused by the improvident or erroneous issuance" of the injunction (29 U. S. C. A. Section 107(e)). Either provision requires the enjoining court to assume the possibility of error in the issuance of preliminary injunctive relief and to protect those enjoined against this contingency, no matter how remote it may seem. To say

that the amount of protection should be measured by the apparent remoteness of the contingency is like appointing a trustee to handle a million dollars in cash but requiring only a hundred dollar bond because the court has great faith in the trustee's honesty.

The danger to the persons enjoined from this sort of speculation by the court with their damage claims is emphasized by the rule that wrongfully enjoined defendants are limited in their recovery against plaintiffs by the amount of the bond which the court, rightly or wrongly, saw fit to require. *International L. Garment Work. Un. v. Donnelly G. Co.*, 147 F. 2d 246 (8th Cir. 1945), certiorari denied in 325 U. S. 852.

Obviously, then, to the enjoined brakemen employees who stand to suffer irreparable wage losses due to the admitted inadequacy of the bond, this will be a matter of crescent importance for as long as the injunction order continues in effect.

We put our plea for the writ on much broader ground. The risk of injury through erroneous issuance of a preliminary injunction is enough for any person enjoined to bear, even with an adequate bond. Without such protection, the enjoined person is forced to carry the additional burden of defending himself without any hope of being made whole, even if his defense ultimately proves good. He therefore goes to trial with the certain knowledge that complete justice has been removed from his reach. We earnestly submit that the action of the trial judge, in deliberately withholding adequate security to those enjoined merely because he would not admit the possibility of his own error in issuing the injunction, calls for the exercise of this Court's supervisory power.

Conclusion.

For the reasons herein stated, we respectfully urge that this Court, in the exercise of its sound judicial discretion, grant the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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